

# Germany: Mannesmann corruption ruling unleashes new debate over “entrepreneurial culture”

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On December 21 of last year, the Federal Court of Justice (BGH) revised the acquittal of Deutsche Bank chief executive Josef Ackermann and five others accused in Germany’s highest-profile corruption trial, referring the case back to the Düsseldorf regional courts. The decision created a stir both in Germany and abroad.

While prominent big business representatives have warned that a guilty verdict against the Deutsche Bank CEO could deter foreign investors, some politicians have argued that the decision signals a defence of the so-called typically German “Rhinish business model.” Surrounding the sensational Mannesmann trial is an ongoing debate over how the further dismantling of the German and west European welfare state can be intensified against a background of growing social tensions and economic crisis.

The crux of the legal arguments during the trial concerned payments to company managers worth millions of euros as part of mobile phone operator Vodafone’s acquisition in 2000 of Mannesmann, the Düsseldorf steel products and telecommunication firm. Such large-scale bonuses are unique in the history of postwar Germany and were until now predominantly a feature of Anglo-Saxon business practices.

During the takeover battle by Vodafone Airtouch, bonus payments totalling almost €60 million were made, with the chairman of the directors at that time, Klaus Esser, pocketing €30 million and supervisory board chairman Joachim Funk receiving €4.6 million, with 18 other former board members or their family members benefiting.

The supervisory board executive committee that agreed to the payments included Josef Ackerman, Joachim Funk and the then IG-Metall union chairman Klaus Zwickel, as well as works council chairman Jürgen Ladberg.

The fact that managers had received such massive sums of money, even when they had failed to prevent the hostile takeover leading to the company being broken up at the expense of the workforce, caused massive indignation at the time. In November 1999, when Vodafone made its first offer, Mannesmann CEO Esser claimed he was firmly opposed to such a hostile takeover, spending millions on an advertising campaign to try to repel the takeover, another first in German business history.

In January 2000, when Vodafone acquired the French telecommunications firm Vivendi, which Mannesmann had been eyeing up to strengthen its own market share, Esser changed his mind and agreed to the takeover, boasting that his efforts in this short period had increased the company’s value by 128 percent to more than €180 billion.

Later, it was revealed that Esser’s agreement was mainly a result of pressure from the largest Mannesmann shareholder, the Hong Kong investment firm Hutchinson Whampoa. In just a few months, the value of their shares in Mannesmann had doubled to €10 billion.

Amidst fierce criticism, the Düsseldorf public prosecutor’s office

launched an investigation in 2003, which then led to criminal proceedings being taken in January 2004.

While the case gained widespread approval from ordinary working people, it led to considerable criticism from business circles oriented towards the US and seeking to rapidly abolish everything in Germany and western Europe they judge to be an obstacle to global competition and massive profits—at the direct expense of the working class.

The current German chancellor Angela Merkel (Christian Democratic Party, CDU), who at the time of the original court case was leader of the parliamentary opposition, made herself the spokeswoman of these elements and declared the criminal proceedings to be “a danger to Germany’s business prospects.” The judiciary should not interfere in the autonomous decisions of business leaders, Merkel stated.

The case before the regional court in Düsseldorf was to decide whether the decisions of the Mannesmann supervisory board executive were tantamount to the criminal offence of “grievous embezzlement.” A tortuously worded court judgement found that although the defendants could be accused of a “substantial breach of duty” this was, however, the result of an “unavoidable mistake” in evaluating the lawfulness of what they were doing. In other words, they did not believe they were doing anything wrong! Therefore, according to the court, they could not be said to have committed a “serious breach of trust,” which is necessary to prove the crime of embezzlement.

Immediately following this judgement, the Düsseldorf Public Prosecutor’s Office and Chief Federal Prosecutor Kay Nehm laid an appeal before the Federal Court of Justice. With exceptional sharpness, Nehm criticised the judgement of the regional court in a 55-page document. He argued it contained “considerable deficiencies” and took only a “partial view,” leading to “statements that range from seriously inconsistent to contradictory.”

Also surprising was the judgement that the curious decision made by the supervisory board executive to “retrospectively” agree to “exceptionally” high money settlements did not represent “grievous embezzlement.” Above all, there was “an obligation” on the part of the accused to have at least delayed the implementation of the decision to pay Funk €4.6 million—a decision in which he participated and that chartered accountants KPMG described as “doubtful” just a few days later—until the matter had been clarified. Instead, they followed the advice of Esser’s lawyer and released the payment after making only slight modifications in formulation.

The Federal High Court judges have now upheld the appeal by the public prosecutor’s office and overruled the regional court judgement, so that the defendants must be retried in court.

In contrast to the regional court, the Federal High Court found that embezzlement had taken place. The regional court had not sufficiently

shown that an “unavoidable mistake” had been made by the accused in evaluating the lawfulness of what they were doing, placing too high a test on establishing the crime of embezzlement in calling for it to be proved there had been a “substantial breach of duty.” The lower court had also failed to sufficiently investigate the compensation made to the 18 former board members, at a value of €32 million, for their alleged loss of pension rights.

Klaus Tolkstdorf, the chairman of the judges, declared that the accused had breached their duty of care for the company’s property and had decided upon these payments without proper consideration: “It is virtually inconceivable that the accused, the prominent German businessman Ackerman and the trade union leader Klaus Zwickel, could have considered they were entitled to take arbitrary decisions about the millions of euros worth of corporate assets entrusted to them.” Even in the case of a takeover, he said, the company’s executive committees were obliged to protect the interests of the enterprise and to behave responsibly during the transitional phase. The supervisory boards were not “lords of the manor, but estate managers,” and were thus obliged to observe their fiduciary duty.

Judge Tolkstdorf expressly stated that the size of the compensation was not a subject of the criminal proceedings, nor could it be. Business enterprises have the unrestricted right to pay very high incentive bonuses, even if the contract of employment lacked such an appropriate clause. A prerequisite, however, was that the enterprise thereby acquired certain advantages. This was not the case here. Esser, Funk and others received the funds without Mannesmann benefiting in any way.

Nevertheless, elsewhere in his ruling, Judge Tolkstdorf did comment on the level of the sums paid, calling them “problematic in various regards.” In view of 5 million unemployed, one could speak of “excess” and of their “socially injurious character.”

The Federal High Court decision is part of a European-wide debate about the conditions necessary to implement social attacks, which are regarded as essential by the ruling elite and governments throughout Europe.

The rejection of the European Union constitution in France and Holland; the mass strikes in France and Belgium; the recent revolts by youth and immigrants in the French suburbs; and the growing resentment in the German population over the continual slashing of the welfare state, mass redundancies and wage cuts have clearly shown the ruling class in Europe and Germany that the destruction of the western European welfare state cannot be carried out without meeting great resistance in the population.

For this reason, a wing of the ruling elite in Germany has taken the view that making such million-euro payments to managers, as is custom and practice in the US and Britain, is only possible if there is no risk of legal challenge and they are guaranteed by state institutions.

Judge Tolkstdorf predicted that some big-business representatives would accuse the court of taking an “unworldly view.” He expressly rejected the reproach that the judgement could damage Germany’s economic situation. “Punishable behaviour should not go unpunished because certain circles break the law,” he said, adding, “Germany would be the first economy to be endangered because it protected enterprises against the harmful access of managers to the company coffers.”

The judgement has pushed the debate precisely in this direction. Parliamentary vice-president Wolfgang Thierse (Social Democratic Party, SPD) said that the judgement was “a public challenge to again discuss entrepreneurial culture and morals in this country.” The aim should be to change the way managers behave. He stressed that the level of compensation payments must bear a relation to the performance achieved. There should also be a discussion about a code or regulations relating to company shares that should formulate the “relation between incomes and the level of compensation compared to the performance achieved in entrepreneurial success,” Thierse said. Moreover, the rights of

shareholders in decisions about such payments have to be strengthened.

On the other hand, finance and credit expert at the Centre of Financial Studies in Frankfurt Jan Pieter Krahn told the *Berliner Zeitung* the judgement could mean a “genuine setback” for the international competitiveness of the German economy. The reversal of the acquittals in the Mannesmann trial could deter investors. “The judgement could give the impression that obstacles are being put in the way, when one seeks to obtain as high an increase in the value of an enterprise as possible,” Krahn said.

Deutsche Bank CEO Josef Ackerman is an avowed supporter of an “Anglo-Saxon” financial system, according to Krahn. His conduct is strongly oriented to the needs of the investors. In Germany, however, it is still usual to place the well-being of the workforce and the interests at the fore.

The international press has also commented along these lines. According to the Swiss daily *Neue Zürcher Zeitung*, the ruling by the Federal High Court represented a “further nationalisation and uncertainty for German business.” The judgement points “to a creeping expansion of state influence.... In today’s Germany, it is the state and the law that define business interests.”

Britain’s *Financial Times* emphasised that the judgement “damaged the country’s reputation as a place to do business” and “reinforces the view that Germany is a country where distrust of success and nationalist protectionism outweigh the rights of shareholders.”

In France, a country shaken by strikes and protests, comments supported the federal court ruling. “The decision of German justice will shape business practices outside Germany as well,” wrote French business journal *La Tribune*. It is to be hoped that the ruling “has a moderating effect on the payment of million-euro premiums to business leaders” beyond Germany.

The federal court ruling also casts a clearer light on the conflicts surrounding the decision last summer to hold premature federal elections. At the end of May 2005, Chancellor Gerhard Schröder (SPD) initiated new elections, which given the Christian Democrat’s projected lead of more than 20 percent equated with handing over power to the CDU/CSU and FDP (Free Democratic Party).

Only when CDU leader Angela Merkel announced she favoured an increase in value added tax (VAT) and brought “flat tax” propagandist Paul Kirchhof into her election team, meeting with fierce resistance in the population while the Left party gained in popularity with the voters, did Chancellor Schröder intervene, organising a demagogic campaign under the slogan “more social justice.” After the election, the SPD took over the most important ministries in a grand coalition government with the CDU, agreed to an even more drastic increase in VAT and is now helping the CDU to implement the very policies that had met with such resistance.

In similar fashion, the high court judgement serves to stabilise conditions in the interest of the ruling class by providing an outlet for public anger and increasing resistance to such million-euro payments to top managers at a time when a wave of mass redundancies is sweeping throughout German industry.



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